RECORD AND BRIEFS

No. 16-299

FILED APR 27 2017

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN SUPPORT OF PETITIONER ON BEHALF OF WATERKEEPER ALLIANCE, INC., CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR FOOD SAFETY, HUMBOLDT BAYKEEPER, RUSSIAN RIVERKEEPER, MONTEREY COASTKEEPER, SNAKE RIVER WATERKEEPER, INC., UPPER MISSOURI WATERKEEPER, INC., TURTLE ISLAND RESTORATION NETWORK, INC., SIERRA CLUB AND PUGET SOUNDKEEPER ALLIANCE

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QUESTION PRESENTED

Whether 33 U.S.C. 1369(b)(1)(F), which provides for direct review in the courts of appeals of any action of the EPA Administrator "in issuing or denying any permit under section 1342" of the Clean Water Act, grants the circuit courts of appeals exclusive jurisdiction to review a federal rule defining the phrase "waters of the United States."

PARTIES TO THE PROCEEDING

An original twelve petitions for review of the Clean Water Rule were filed in eight different circuits courts of appeals; these petitions were consolidated and transferred to the Sixth Circuit by the United States Judicial Panel on Multidistrict Litigation. (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)). An additional ten petitions for review were filed after that date and also consolidated.

Respondents Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., and Turtle Island Restoration Network, Inc. were petitioners below in No. 15-3837.

Respondents Puget Soundkeeper Alliance and Sierra Club were petitioners below in No. 15-3839.

Petitioner here, National Association of Manufacturers, was an intervenor-respondent in many of the petitions for review filed below.

Federal respondents here, and respondents below, are the U.S. Environmental Protection Agency; Scott Pruitt, in his official capacity as Administrator of the Environmental Protection

Agency[1]; U.S. Army Corps of Engineers; Robert M. Speer, in his official capacity as Acting Secretary of the Army[2]; and Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army for Civil Works.

The States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia are respondents here, and were intervenor-respondents below.

The other petitioners below, and respondents here, include:

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent

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[1] Administrator Pruitt was sworn in as EPA Administrator on February 17, 2017, and replaces Gina McCarthy as respondent pursuant to Supreme Court Rule 35.3.

[2] Secretary Speer was appointed Acting Secretary of the Army effective January 20, 2017, and replaces John McHugh as respondent pursuant to Supreme Court Rule 35.3.

Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Respondents Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., Turtle Island Restoration Network, Inc., Sierra Club, and Puget Soundkeeper Alliance are not-for-profit public advocacy organizations that have no parent corporations and do not issue stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT v

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. Section 1369(b)(1)'s Grant of Direct Judicial Review in the Courts of Appeals is Limited 11

II. The Issuance of a Rule Clarifying the Waters to Which the Clean Water Act Applies does not Constitute the Issuance or Denial of a Permit Under Section 1342 of the Statute 19

A. Under the Plain Language of Section 1369(b)(1)(F), a Rule Defining Which Waters Constitute "Waters of the United

States" for Purposes of Establishing Clean Water Act Jurisdiction is not the Issuance or Denial of a Permit Under Section 1342 19

B. Neither *E.I. du Pont* Nor *Crown Simpson* Establishes that Section 1369(b)(1)(F) Extends to EPA Rules Bearing Generally on the NPDES Program 27

C. The Courts that Have Broadly Applied Section 1369(b)(1)(F) to General NPDES Regulations Have Improperly Departed from the Statute 32

III. An Expansive Reading of Section 1369(b)(1) Disrupts the Traditional Jurisdiction Federal Courts Maintain to Review Agency Actions 35

CONCLUSION 44

TABLE OF AUTHORITIES

Cases **Page**

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 35

Adamo Wrecking Co. v. *United States*,
434 U.S. 275 (1978) 40, 41

Am. Iron and Steel Inst. v. *EPA*,
543 F.2d 521 (3d Cir. 1976) 17

Cases (cont.) **Page**

Am. Mining Cong. v. *EPA*,
965 F.2d 759 (9th Cir. 1992) 31, 32, 33

Am. Paper Inst. v. *EPA*,
882 F.2d 287 (7th Cir. 1989) 29, 30, 39

Am. Portland Cement Alliance v. *EPA*,
101 F.3d 772 (D.C. Cir. 1996) 16

ANR Pipeline Co. v. *FERC*,
988 F.2d 1229 (D.C. Cir. 1993) 39

Appalachian Energy Group v. *EPA*,
33 F.3d 319 (4th Cir. 1994) 17

Ark. Poultry Fed'n v. *EPA*,
852 F.2d 324 (8th Cir. 1988) 17

Arkansas v. *Oklahoma*,
503 U.S. 91 (1992) 19, 20

Auer v. *Robbins*,
519 U.S. 452 (1997) 38

Barnhart v. *Peabody Coal Co.*,
537 U.S. 149 (2003) 13

Bethlehem Steel Corp. v. *EPA*,
538 F.2d 513 (2d Cir. 1976) 17

Bowen v. *Mich. Acad. of Family Physicians*,
476 U.S. 667 (1986) 35

Cases (cont.) **Page**

Cent. Hudson Gas & Elec. Corp. v. *EPA*,
587 F.2d 549 (2d Cir. 1978) 18, 19

Chevron, U.S.A., Inc. v. *Nat. Res. Def. Council, Inc.*,
467 U.S. 837 (1984) 23

Chrysler Corp. v. EPA,
600 F.2d 904 (D.C. Cir. 1979) 41

City of Baton Rouge v. *EPA*,
620 F.2d 478 (5th Cir.1976) 17

Coeur Alaska, Inc. v. *Se. Alaska Cons. Council*,
557 U.S. 261 (2009) 14, 25, 34

Crown Simpson Pulp Co. v. *Costle*,
445 U.S. 193 (1980) ..... passim

Decker v. *Nw. Envt'l Def. Ctr.*,
133 S. Ct. 1326 (2013) 3, 36

E. I. du Pont de Nemours & Co. v. *Train*,
430 U.S. 112 (1977) ..... passim

Eagle-Picher Industries, Inc. v. *EPA*,
759 F.2d 905 (D.C. Cir. 1985) 39

Envtl. Prot. Info. Ctr. v. *Pac. Lumber Co.*,
266 F. Supp. 2d 1101 (N.D. Cal. 2003) 21

Friends of the Earth v. *EPA*,
333 F.3d 184 (D.C. Cir. 2003) 17

Cases (cont.) **Page**

Gutierrez de Martinez v. *Lamagno*,
515 U.S. 417 (1995) 35

Harrison v. *PPG Industries, Inc.*,
446 U.S. 578 (1980) 31, 40, 41

Idaho Rural Council v. *Bosma*,
143 F.Supp.2d 1169 (D. Idaho 2001) 20

In re U.S. Dep't of Def., EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.,
817 F.3d 261 (6th Cir. 2016) ..... passim

Interstate Commerce Comm'n v. *Brotherhood Of Local Eng'rs*, 482 U.S. 270 (1987) 36, 38, 39

Legal Envtl. Assistance Found., Inc. v. *Pegues*,
904 F.2d 640 (11th Cir. 1990) 17

Lujan v. *Nat'l Wildlife Fed'n*,
497 U.S. 871, 882 (1990) 7

McNary v. *Haitian Refugee Ctr., Inc.*,
498 U.S. 479 (1991) 34

Narragansett Elec. Co. v. *EPA*,
407 F.3d 1 (1st Cir. 2005) 17

Nat'l Cotton Council of Am. v. *EPA*,
553 F.3d 927, (6th Cir. 2009) 6, 26, 32

Cases (cont.) **Page**

Nat'l Mining Ass'n v. *Jackson*,
880 F. Supp. 2d 119 (D.D.C. 2012) 30

Natural Res. Def. Council, Inc. v. *Costle*,
568 F.2d 1369 (D.C. Cir. 1977) 21

Natural Res. Def. Council, Inc. v. *EPA*,
526 F.3d 591 (9th Cir. 2008) 32

Natural Res. Def. Council, Inc. v. *EPA*,
966 F.2d 1292 (9th Cir. 1992) 32

Natural Res. Def. Council, Inc. v. *EPA*,
673 F.2d 400 (D.C. Cir. 1982) 24, 33

Natural Res. Def. Council, Inc. v. *EPA*,
656 F.2d 768 (D.C. Cir. 1981) 33

Nw. Envtl. Advocates v. *EPA*,
537 F.3d 1006 (9th Cir. 2008) 20, 21

Ohio Forestry Ass'n, Inc. v. *Sierra Club*,
523 U.S. 726 (1998) 38

Rapanos v. *United States*,
547 U.S. 715 (2006) 2, 24, 25, 34

Recreational Vehicle Indus. Ass'n v. *EPA*,
653 F.2d 562 (D.C. Cir. 1981) 37

Reno v. *Catholic Soc. Servs., Inc.*,
509 U.S. 43 (1993) 35

Cases (cont.) **Page**

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) 23, 24, 25, 34

Tenn. Valley Auth. v. *Hill*, 437 U.S. 153 (1978) 12

Tex. Mun. Power Agency v. *EPA*, 799 F.2d 173 (5th Cir. 1986) 24

United States v. *Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997) 37

United States v. Magnesium Corp. of America, 616 F.3d 1129 (2010) 37

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 24, 34

Waterkeeper Alliance, Inc. v. *EPA*, 399 F.3d 486 (2d Cir. 2005) 28

Yakus v. *United States*, 321 U.S. 414 (1944) 40

Federal Statutes **Page**

5 U.S.C. 701(a) 35
5 U.S.C. 702 4
5 U.S.C. 702(a) 7
16 U.S.C. 1540(g)(1)(a) 6
28 U.S.C. 1254(1) 1

Federal Statutes (cont.) **Page**

33 U.S.C. 1251(a) 2
33 U.S.C. 1251(d) 16
33 U.S.C. 1311 ..... passim
33 U.S.C. 1311(a) 2, 14, 21
33 U.S.C. 1311(b) 14
33 U.S.C. 1311(b)(1)(C) 20
33 U.S.C. 1313 22
33 U.S.C. 1314 ..... 15, 28
33 U.S.C. 1314(b) 14
33 U.S.C. 1314(b)(1)(A) 28
33 U.S.C. 1314(b)(1)(B) 28
33 U.S.C. 1321 ..... 15, 22
33 U.S.C. 1341 22
33 U.S.C. 1342 ..... passim
33 U.S.C. 1342(a)(1) 20
33 U.S.C. 1342(a)(2) 20
33 U.S.C. 1342(a)(3) 21
33 U.S.C. 1342(b)(1)(B) 21
33 U.S.C. 1342(d) 30
33 U.S.C. 1344 ..... passim
33 U.S.C. 1344(d) 16
33 U.S.C. 1361(a) 9, 15
33 U.S.C. 1362 ..... 11, 14
33 U.S.C. 1362(7) 2, 14, 22
33 U.S.C. 1362(11) 28
33 U.S.C. 1362(12) 14, 21
33 U.S.C. 1369(b) ..... passim
33 U.S.C. 1369(b)(1) ..... passim
33 U.S.C. 1369(b)(1)(A)-(G) 12, 13
33 U.S.C. 1369(b)(1)(C) 17
33 U.S.C. 1369(b)(1)(E) ..... passim
33 U.S.C. 1369(b)(1)(F) ..... passim

Federal Statutes (cont.) **Page**

42 U.S.C. 7607(b)(1) 9, 15, 40, 41

Federal Regulations **Page**

33 C.F.R. 328.3(a) (2012) 26
40 C.F.R. 122.2 (2012) 26
40 C.F.R. 122.4(d) 20
40 C.F.R. 122.26(b)(14) 37
40 C.F.R. 232.2 25

Other Authorities **Page**

123 Cong. Rec. S26, 754 (daily ed. Aug. 4, 1977) .. 15

H.R. Rep. No. 95-830 (1977) (Conf. Rep.) 15

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. 31,129 (May 9, 2002) 25

Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015) 15, 20, 22

OPINIONS BELOW

The decision of the court of appeals is reported at 817 F.3d 261. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. No. 15-3751, Dkt. #92-1. The regulation under review in these consolidated cases is *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015).

JURISDICTION

The order and judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. On July 1, 2016, Justice Kagan extended the time to file petitions for a writ of certiorari to September 2, 2016, and Petitioner National Association of Manufacturers filed its petition on that date. This Court granted the petition for writ of certiorari on January 13, 2017. The Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 509(b) of the Clean Water Act, 33 U.S.C. 1369(b), are set forth in the appendix to petitioner's petition for writ of certiorari at 53a-54a.

STATEMENT

In order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), the Clean Water Act ("CWA" or "Act") broadly regulates the discharge of pollutants to "navigable waters", which are defined by the Act to mean "the waters of the United States." *Id.* at 1362(7). The meaning of this phrase has broad ramifications for the implementation of nearly every regulatory program under the Act, and so it is perhaps unsurprising that the interpretation of the phrase has engendered considerable controversy since the CWA was enacted in its current form in 1972. See, *e.g.*, *Rapanos* v. *United States*, 547 U.S. 715, 723-729 (2006) (discussing the interpretation of the phrase "waters of the United States" over the years by the Agencies and the courts).

In June of 2015 respondents U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, the "Agencies") promulgated a regulation in an effort to bring clarity and certainty to the scope of the CWA. *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015) ("Clean Water Rule" or "Rule"). The Rule constitutes the Agencies' latest effort to define the statutory phrase "waters of the United States," and thereby identify the waters subject to the Act's general prohibition on pollutant discharges, see 33 U.S.C. 1311(a), as well as the regulatory permit

programs under the Act's National Pollutant Discharge Elimination System ("NPDES") and Section 404 of the Act. See generally *id.* at 1342, 1344.

Although the Clean Water Rule codified the Agencies' long-standing application of the Act to several types of non-navigable waters, including certain defined tributaries and their adjacent wetlands, the Rule also created numerous permanent exemptions from CWA jurisdiction for ecologically important waters such as ephemeral streams, waters beyond 4,000 feet from certain other jurisdictional waters, and groundwater. As a result, these waters—potentially consisting of millions of acres of wetlands and thousands of miles of streams, according to the Corps—are left vulnerable to pollution and degradation. For these reasons respondents Waterkeeper Alliance, Inc., Center for Biological Diversity, Center for Food Safety, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Inc., Upper Missouri Waterkeeper, Inc., and Turtle Island Restoration Network, Inc. (collectively, "Waterkeeper") sought review of the Clean Water Rule, as did respondents Puget Soundkeeper Alliance and Sierra Club (collectively, "Puget Soundkeeper").

As relevant here, the CWA provides for direct review in the courts of appeals of any action by the Administrator of the EPA "in issuing or denying any permit under section 1342 of" the Act. 33 U.S.C. 1369(b)(1)(F). This jurisdiction is

both original and exclusive. *Decker* v. *Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). Petitions for review must be filed within 120 days after the date of the Administrator's action of which review is sought. 33 U.S.C. 1369(b)(1).

Like all petitioners, Waterkeeper and Puget Soundkeeper faced a quandary: Should they seek review of the Clean Water Rule in the court of appeals under Section 1369(b)(1), or should they instead file suit in the district court under the Administrative Procedure Act, 5 U.S.C. 702 *et seq.*? Under the plain language of the statute the answer seems simple enough; on its face the Rule merely defines a statutory phrase, albeit a critically important one. It imposes no effluent limitation or other limitation directly upon any discharger, nor does it issue or deny any permit under Section 1342, which establishes the NPDES permitting program. Yet in light of the muddled case law in some circuits that has expanded the universe of Administrator actions subject to review under 33 U.S.C. 1369(b)(1), as well as the attendant risk that the opportunity for review would be forever extinguished 120 days after promulgation of the Rule, no prudent litigant would make that "either/or" choice.

Waterkeeper timely filed its petition for review under Section 1369(b)(1) in the Ninth Circuit on July 22, 2015, as did Puget Soundkeeper. Ten other petitions for review were filed in the Second, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits; these petitions were ultimately

consolidated and transferred to the Sixth Circuit by the United States Judicial Panel on Multidistrict Litigation. (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)). Ten other later-filed petitions for review were consolidated and transferred to the Sixth Circuit as well.

A month later Waterkeeper filed a complaint against respondents in the United States District Court for the Northern District of California, seeking review of the Clean Water Rule and alleging violations of the Administrative Procedure Act ("APA"), CWA, Endangered Species Act ("ESA"), and National Environmental Policy Act ("NEPA"). *Waterkeeper Alliance et al.* v. *EPA et al.*, No. 15-cv-03927 (N.D. Cal. filed Aug. 27, 2015). Waterkeeper voluntarily dismissed that case in June 2016, only after the Sixth Circuit had determined to proceed under Section 1369(b)(1)(F). Puget Soundkeeper filed a separate complaint in district court, which has been stayed since October 30, 2015. *Puget Soundkeeper Alliance, et al. v. EPA, et al.*, No. 15-cv-1342 (W.D. Wash. filed Aug. 20, 2015).

Over a hundred other parties followed the same two-pronged approach, and thus in addition to the consolidated petitions for review before the Sixth Circuit there were at least twelve suits filed in district courts around the country, all seeking review of the Clean Water Rule. The Judicial Panel on Multidistrict Litigation declined to consolidate these district court actions, see *In re:*

Clean Water Rule, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015), and litigation before the Sixth Circuit proceeded concurrently with these district court cases. The result, predictably, was chaos. See generally Nat'l Assn. of Mfrs. ("NAM") Cert. Pet. at 9-14.

Numerous petitioners, including Waterkeeper, moved the Sixth Circuit to dismiss their own petitions. The court denied those motions in a fractured decision, each judge writing only for himself. Judge McKeague wrote the lead opinion, reading Section 1369(b)(1) expansively and holding that direct appellate review of the Clean Water Rule was proper under either Section 1369(b)(1)(E) or (F). *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016). Judge Griffin joined only in the judgment, believing he was bound to do so by the court's prior decision in *Nat'l Cotton Council of America v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009), yet wrote separately to explain why he believed neither 1369(b)(1)(E) or (F) applies to the Clean Water Rule. *In re U.S. Dep't of Def.*, 817 F.3d at 275-283. Finally, in a dissenting opinion, Judge Keith agreed with the reasoning of Judge Griffin's opinion, but found that *National Cotton Council* does not control the outcome of the jurisdictional question posed in this case. *Id.* at 283-284.

This jurisdictional confusion uniquely affects Waterkeeper, who—alone among the challengers to the Clean Water Rule—contends that the

Agencies violated both the ESA and NEPA when they promulgated the Clean Water Rule. Were it not for the confounding implication of Section 1369(b)(1), Waterkeeper's ESA and NEPA claims would have been properly brought in the district court. See 16 U.S.C. 1540(g)(1)(a) (ESA's citizen suit provision, vesting the district courts with jurisdiction to enjoin "the United States and any other governmental instrumentality or agency" from violating the ESA); *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (explaining how an agency's alleged violations of NEPA are reviewed under Section 10(a) of the APA, 5 U.S.C. 702(a)).

Waterkeeper and Puget Soundkeeper challenge the Clean Water Rule from the opposite end of the spectrum from NAM; Waterkeeper and Puget Soundkeeper allege that the Rule impermissibly abandons CWA jurisdiction over many ecologically valuable waters that have been historically regulated by the Agencies, whereas NAM and its allied challengers argue that the Rule unlawfully expands CWA jurisdiction. See, *e.g.*, Compl. ¶ 3, *Am. Farm Bureau Fed'n et al.* v. *EPA et al.*, No. 15-cv-00165 (S.D. Tex. filed July 2, 2015). But on the limited issue of whether the courts of appeals have jurisdiction over the Rule under Section 1369(b)(1), Waterkeeper and Puget Soundkeeper argue in support of NAM because NAM is correct that these cases belong in the district courts. Those affected by rules promulgated under the CWA—be they environmental advocates seeking to protect our

nation's natural resources, or businesses regulated under the Act's permitting programs—stand to benefit from a plain-text construction of Section 1369(b)(1)(F) that adds certainty to the litigation process and affords the presumptively expansive opportunities for judicial review Congress intended in the APA.

SUMMARY OF THE ARGUMENT

1. The question presented by petitioner is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead seeks to define the waters that fall within Clean Water Act ("CWA") jurisdiction. The answer to that question is yes. The judgment of the court of appeals should be reversed because Section 1369(b)(1) provides for direct review in the courts of appeals only for explicitly listed actions, none of which encompasses jurisdictional rules. More specifically, the promulgation of a rule seeking to define the waters to which the statute applies simply cannot be deemed the "issu[ance] or den[ial]" of a permit under Section 1342 of the Act. The plain language of the CWA compels this result.

a. Section 1369(b)(1) of the CWA provides for direct review in the courts of appeals for seven specific categories of actions taken by EPA under the statute. On its face, this provision offers no indication that the courts of appeals should have

direct review over unspecified actions. The conclusion that they do not is underscored by the fact that Section 1369(b)(1) specifically mentions the promulgation of rules under several statutory sections, none of which is at issue here. Significantly, it makes no mention of EPA's general rulemaking authority under the Act, 33 U.S.C. 1361(a), which provides the firmest foundation for the Clean Water Rule.

Two other dynamics provide further support for this conclusion. First, Congress could easily have inserted—but did not—a "catch-all" provision for any "final action taken" by the Administrator, as it did in a similar judicial review provision in the Clean Air Act ("CAA"), 42 U.S.C. 7607(b)(1). And second, all of the identified situations in Section 1369(b)(1) reference actions taken solely by EPA; none references either actions taken by the Corps of Engineers or, as here, actions undertaken jointly by both agencies.

b. The Agencies' promulgation of a rule defining the waters to which the CWA applies was not the issuance or denial of an NPDES permit within the meaning of Section 1369(b)(1)(F). Put simply, by its terms Section 1369(b)(1)(F) applies to decisions EPA makes in response to particular permit applications. The Clean Water Rule, by contrast, addresses broad questions regarding the waters to which the statute applies; it does not relate with sufficient particularity to any particular NPDES permit application or decision. Moreover, its effects far

transcend particularized permit decisions, in some instances categorically eliminating any need for a permit application.

Further, by its terms this rule applies well beyond the realm of NPDES permit decisions, however broadly interpreted. Indeed, it defines the waters with respect to which the states must develop water quality standards. And even more pointedly, it does the same for waters subject to the Corps' permit authority under Section 1344, colloquially known as the "Section 404 permit program." It is telling that nothing in Section 1369(b)(1) gives any indication that its judicial-review-channeling dynamics should apply in these contexts. It is also telling that applying Section 1369(b)(1) in the context of Section 1344 would be in tension with the traditional review authority this Court has exercised in wetlands cases.

c. Nothing in either *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), or *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), should alter this analysis. Taken together, this Court's decisions in those cases indicate only that the courts of appeals can hear direct challenges either to EPA actions listed in Section 1369(b)(1) or to other actions having the "precise effect" of listed actions. Neither decision supports the conclusion that Section 1369(b)(1)(F) should be stretched to include actions having nothing to do with specific permit applications.

2. An expansive reading of Section

1369(b)(1)(F) would be in tension with traditional ripeness analysis, would promote excessive and unnecessary litigation, and would pose serious fairness and due process concerns in situations in which entities are foreclosed from challenging the validity of regulations in enforcement cases.

For these reasons, the Court should reverse the judgment of the court of appeals. The Sixth Circuit does not have direct jurisdiction to hear this case.

ARGUMENT

Section 1369(b)(1)(F)'s text plainly does not authorize–let alone compel–direct review in the courts of appeals regarding challenges to rules interpreting the Clean Water Act's ("CWA") jurisdictional reach. This Court's holdings on Section 1369(b)(1) are limited, and do nothing to alter the clear thrust of the statute in this context. For these reasons, and in light of the troubling implications of an expansive reading of Section 1369(b)(1)(F), the Court should determine that the Sixth Circuit did not have original jurisdiction over challenges to the Clean Water Rule.

I. SECTION 1369(b)(1)'S GRANT OF DIRECT JUDICIAL REVIEW IN THE COURTS OF APPEALS IS LIMITED

Section 309(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), is inapplicable to challenges to EPA and Corps rules clarifying the basic jurisdictional

terms established in Sections 1311 and 1362 of the Act. 33 U.S.C. 1311, 1362. Congress expressly enumerated seven EPA Administrator actions[1] subject to Section 1369(b)(1). Section 1369(b)(1) provides for review in the courts of appeals of EPA actions:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1304(l) of this title
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[1] Hereafter, we refer to both the EPA Administrator and to the agency itself as "EPA."

[2] In the court below, the Government argued that the Clean Water Rule could constitute the promulgation of an "an effluent limitation or other limitation" under Section

33 U.S.C. 1369(b)(1)(A)–(G).

On its face, Section 1369(b)(1) offers no indication that Congress intended the scope of this provision to extend beyond the explicitly listed actions. See, *e.g.*, *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 188 (1978) (applying the maxim *expressio unius est exclusio alterius* to conclude that Congress did not intend to exempt any "hardship cases" from the Endangered Species Act beyond those expressly listed in the statute). Instead, its precision demonstrates that Congress intended Section 1369(b)(1) to apply *only* to the EPA actions listed therein. Indeed, the only logical inference is that Congress intended to *exclude* EPA actions not specifically listed in Section 1369(b)(1). *See Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[T]he canon *expressio unius est exclusio alterius* . . . has force . . . when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence") (internal quotation omitted).

The conclusion that Section 1369(b)(1) does not encompass unspecified categories of regulations is buttressed by the fact that Section 1369(b)(1) makes specific reference to the "promulgat[ion]" of regulations under several specified statutory sections, 33 U.S.C. 1369(b)(1)(A), (C), (E), and (G), none of which is at

issue here.[2] Significantly, Section 1369(b)(1) makes no reference to rules addressing Section 1311(a), which is the provision of the statute that requires those who "discharge . . . any pollutant" to obtain a permit under either Section 1342 or Section 1344.[3] Nor does it mention either Section

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[2] In the court below, the Government argued that the Clean Water Rule could constitute the promulgation of an "an effluent limitation or other limitation" under Section 1369(b)(1)(E). Two of the three judges on the relevant panel rejected that position. See *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 276-280 (6th Cir. 2016) (Griffin, J., concurring in the judgment), 283 (Keith, J., dissenting). This makes eminent sense given the fact that, under the Act, effluent limitations by definition relate to dischargers, 33 U.S.C. 1362(11), and that therefore, under the canon of *noscitur a sociiis*, so too should the "other limitation" phrase. Cf. *id.* at 276 (Griffin, J., concurring in judgment and applying *noscitur a sociiis*) ("The Act defines 'effluent limitation' as expressly relating to *discharges*[.]) (emphasis in original). Perhaps for this reason, the Government did not seek *certiorari* regarding this determination.

[3] See 33 U.S.C. 1311(a), referencing 33 U.S.C. 1342 (creating the NPDES permit program) and 1344 (creating a permit program for the discharge of dredged or fill material). See also *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 273-275 (2009) (discussing the relationship between the two permitting programs). Section 1369(b)(1)(E) does reference Section 1311, but only with respect to "effluent limitations or other limitations" established thereunder. As this Court recognized in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), the statute contemplates that EPA is to establish effluent limitations pursuant to 33 U.S.C. Section 1311(b), after having first developed effluent limitation guidelines under 33 U.S.C. Section 1314(b). *Id.* at 130-131.

1362(12), which defines that key jurisdictional phrase, or Section 1362(7), which further defines the term "navigable waters" as "the waters of the United States." These are key statutory definitions that delineate the reach of the Act itself.

Even more pointedly, Section 1369(b)(1) makes no mention of Section 1361(a), which provides EPA with its general rulemaking authority under the Act. 33 U.S.C. 1361(a). In the preamble to the final rule, EPA and the Corps cited several statutory provisions as providing the authority for the Clean Water Rule,[4] of which Section 1361(a) is the only one that explicitly authorizes rulemaking with regard to anything other than the development of effluent limitations. If Congress had intended for EPA's promulgation of regulations under Section 1361(a) to be included in Section 1369(b)(1)(F), it would have expressly said so.

Moreover, Congress could readily have included in Section 1369(b)(1) a "catch-all" provision for any "final action taken" by the Administrator, as it did in a similar judicial

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Section 1311(a), by contrast, establishes the basic jurisdictional parameters of the NPDES and Section 404 permit programs, when taken together with the relevant definitional provisions in Section 1362.

[4] 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) (citing 33 U.S.C. 1311, 1314, 1321, 1342, 1344, and 1361 as providing the authority for the Clean Water Rule).

review provision in the Clean Air Act ("CAA"), 42 U.S.C. 7607(b)(1). But it did not.[5] Congress's decision not to do so further demonstrates that it intended for the courts of appeals to have direct review over only the actions listed in Section 1369(b)(1).[6]

Finally, the conclusion that Section 1369(b)(1) should be limited to the expressly-identified circumstances is underscored by the fact that all of the identified situations address actions taken solely by EPA.[7] Not one pertains to a context where, as here, EPA and the Corps have taken joint action under the statute. Indeed, neither the Corps, nor the corresponding term of

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[5] When Congress was amending the Clean Water Act in 1977, Senators Kennedy and Javits proposed an amendment to the bill on the floor of the Senate that would have, among other things, expanded Section 1369(b)(1) to cover any EPA action in "promulgating any regulation issued under section [1311] or [1342]." 123 Cong. Rec. S26,754 (daily ed. Aug. 4, 1977). In the end, however, these amendments were not adopted. H.R. Rep. No. 95-830, at 112 (1977) (Conf. Rep.).

[6] A similar judicial review provision in the Resource Conservation and Recovery Act ("RCRA") also does not include a "catch-all" provision. Courts have interpreted the RCRA provision to include only the actions expressly listed in the statute. *See, e.g., Am. Portland Cement Alliance* v. *EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996).

[7] The statutory term of art used throughout Section 1369 is the "Administrator," which is defined in Section 1251(d) to mean the Administrator of EPA.

art, the "Secretary,"[8] nor Section 1344 itself–the foundation of the Section 404 permit program–is mentioned once in Section 1369(b). Section 1369(b)'s failure to make any reference to the Corps takes on particular resonance given the Corps' lead role in implementing Section 1344, one of the two key permit programs under the Act. The inference is inescapable: Congress intended that direct review in the courts of appeals be limited to a specific list of actions, all of which are taken solely by EPA.

Recognizing Congress's intent to limit Section 1369(b)(1) to the actions expressly enumerated in that section, many courts of appeals have correctly interpreted the provision by staying true to its text. See, *e.g.*, *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 517 (2d Cir. 1976) ("[T]he complexity and specificity of [Section 1369](b) in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable."); *Friends of the Earth* v. *EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("We agree with our sister circuits [the 2nd, 5th, 8th, and 11th Circuits]: original jurisdiction over EPA actions not expressly listed in [S]ection 1369(b)(1) lies not with us, but with the district court.").[9] So too

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[8] See 33 U.S.C. 1344(d).

[9] See also *Am. Iron and Steel Inst.* v. *EPA*, 543 F.2d 521, 528 (3d Cir. 1976) (referring to Section 1369(b)(1)(E) and (F) as "explicit and limited provisions"); *Appalachian Energy*

should the analysis here start from the premise that *only those EPA actions precisely listed in Section 1369(b)(1)* are subject to that provision's limitations on judicial review.

Group v. EPA, 33 F.3d 319, 322 (4th Cir. 1994) (rejecting original jurisdiction over an internal EPA memorandum in part because Section 1369(b)(1) limits its jurisdiction to "specified actions of the EPA administrator"); *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1980) ("[T]he rule is clear: the Courts of Appeals have jurisdiction for direct review only of those EPA actions specifically enumerated" in Section 1369); *Ark. Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988) (noting that courts of appeals' original jurisdiction under Section 1369(b)(1)(C) is limited); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 642 (11th Cir. 1990) (stating that Section 1369 provides for "direct review in a circuit court of appeals of specific administrative actions under the statute"); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005) ("[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b), not all EPA actions taken under the CWA are directly reviewable in the courts of appeals.").

II. THE ISSUANCE OF A RULE CLARIFYING THE WATERS TO WHICH THE CLEAN WATER ACT APPLIES DOES NOT CONSTITUTE THE ISSUANCE OR DENIAL OF A PERMIT UNDER SECTION 1342 OF THE STATUTE

A. Under the Plain Language of Section 1369(b)(1)(F), a Rule Defining Which Waters Constitute "Waters of the United States" for Purposes of Establishing Clean Water Act Jurisdiction is not the Issuance or Denial of a Permit Under Section 1342

Section 1369(b)(1)(F) grants the courts of appeals direct review over EPA's action "in issuing or denying any permit under Section 1342" of the CWA. 33 U.S.C. 1369(b)(1)(F). This provision is plainly about the issuance or denial of a particular NPDES permit. See, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (finding that Section 1369(b)(1)(F) is limited "to a direct challenge to the merits of a decision to 'issue or deny' a NPDES permit."); *Arkansas* v. *Oklahoma*, 503 U.S. 91, 97 (1992) (assuming without discussion that the court of appeals had original jurisdiction to review EPA's issuance of an NPDES permit).

As Judge Griffin noted below, "[u]nder a plain text reading, the Clean Water Rule neither issues

nor denies a permit under the NPDES." *In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 280 (6th Cir. 2016) (Griffin, J., concurring in the judgment). Instead, the Rule clarifies the waters to which the CWA does and does not apply. Simply put, a rule addressing the jurisdictional reach of the statutory waters of the United States does not relate with sufficient particularity to any specific permit application. We turn again to Judge Griffin:

> At best, the Clean Water Rule is one step removed from the permitting process. It informs whether the Act requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit.

Id. at 281 (Griffin, J., concurring in the judgment).

In the court below, the Government argued that the Clean Water Rule should be deemed to constitute the "issu[ance] or den[ial]" of a permit merely because it affects permit decisions. *In re U.S. Dept. of Def.*, 817 F.3d at 270-271 (McKeague, J., lead opinion). But this argument glosses over the dissimilarity of the two types of actions. To the extent that the Rule provides regulatory exemptions–as it does, for example, with respect to all seasonal streams not meeting

the new definition of "tributary"[10]–the effect is that dischargers may continue discharging without restriction and without fear of liability under the CWA. This is in no way akin to the issuance of a permit. Under both the statute and EPA's regulations, EPA can only issue permits if they meet specified requirements, including, for example, ensuring compliance with water quality standards. 33 U.S.C. 1311(b)(1)(C), 1342(a)(1) and (2); 40 C.F.R 122.4(d); see also *Arkansas*, 503 U.S. at 105-107 (upholding 40 C.F.R. 122.4(d) even to the extent that it requires compliance with the water quality standards of downstream states). By contrast, a regulatory exemption negates these requirements, *including the permit requirement itself*. A regulatory action that negates the very need for a permit cannot be deemed to be the equivalent of a permit issuance. *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008) ("*NWEA*") (finding that permanent exemptions from the NPDES program are not even "functionally similar" to the issuance of an NPDES permit); *Envtl. Prot. Info. Ctr.* v. *Pac. Lumber Co.*, 266 F. Supp. 2d 1101, 1114 (N.D. Cal. 2003) (noting that the effect of an exemption "is to exclude sources from the NPDES program,

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[10] See, *e.g.*, 80 Fed. Reg. at 37,058. The Clean Water Rule also categorically excludes groundwater, regardless of whether it has a significant hydrological relationship with any nearby surface waters. *Id.* at 37059. *Cf. Idaho Rural Council* v. *Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (concluding that groundwater may be a "water of the United States" where it has such a relationship).

whereas the issuance or denial of a permit, as a matter of statutory mandate, only occurs when there are point sources regulated by the NPDES program.").[11]

At the other end of the spectrum, in contexts in which the Clean Water Rule constitutes an assertion of regulatory jurisdiction, it similarly cannot be understood to operate in any sense like either a permit issuance or denial. Instead, it merely indicates the situations in which an NPDES permit is required should a person or facility wish to discharge pollutants.[12] As Judge Griffin indicated, it merely sets the stage for an eventual permit decision if the relevant water comes within its terms. *In re U.S. Dept. of Defense*, 817 F.3d at 281 (Griffin, J., concurring in the judgment).

Judge Griffin also identified another textual problem with equating the Clean Water Rule with the issuance or denial of an NPDES permit: it applies across the entire statute, not just under

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[11] See also *Natural Res. Def. Council, Inc.* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) (noting that even "general permits"–meaning those which are applicable to multiple sources–are different from exemptions because they must be revisited every five years, whereas exemptions "tend[] to be become indefinite[.]) (citing 33 U.S.C. 1342(a)(3), (b)(1)(B).

[12] See 33 U.S.C. 1311(a), 1362(12) (collectively requiring permits for "any addition of any pollutant to navigable waters from any point source").

the NPDES program. *In re U.S. Dept. of Defense*, 817 F.3d at 281 (Griffin, J., concurring in the judgment). The Agencies themselves acknowledged this dynamic in the preamble to the Rule:

> The jurisdictional scope of the CWA is "navigable waters," defined in section [1362(7)] of the statute as "waters of the United States, including the territorial seas." The term "navigable waters" is used in a number of provisions of the CWA, including the . . . [NPDES] program, the section [1344] permit program, the section [1321] oil spill prevention and response program, the water quality standards and total maximum daily load programs (TMDL) under section [1313], and the section [1341] state water quality certification process.

80 Fed. Reg. at 37,055 (footnote omitted). Deeming the Clean Water Rule to constitute the issuance or denial of an NPDES permit would have implications for programs that Congress never intended to be touched by Section 1369(b)(1).

These implications would be particularly stark in the context of the Section 1344 permitting program. As mentioned, the Corps has the lead role under Section 1344. In that capacity, it of course has the implied authority, under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to promulgate rules

resolving ambiguities in any of the relevant statutory provisions. Indeed, it has a long history of defining the phrase here at issue—"the waters of the United States"—culminating in its joint involvement in the Clean Water Rule. See generally *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 183-184 (2001) ("*SWANCC*") (Stevens, J., dissenting) (discussing the pre-Clean Water Rule evolution of the Corps' jurisdictional rules).

As also mentioned, Section 1369(b)(1) gives no indication that it has any bearing on either the Corps or the permit program it administers under Section 1344. Given that silence, it is unsurprising that courts, including this Court, have repeatedly considered the legality of various aspects of the Corps' regulatory definitions of the phrase "waters of the United States" in as-applied challenges, without regard to whether those challenges were untimely under the stringent requirements of Section 1369(b)(1),[13] or were otherwise improperly filed because they were not brought directly in the courts of appeals. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (arising from an enforcement case); *SWANCC*, 531 U.S. 159 (2001) (in which a permit denial was appealed in the district court);

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[13] Section 1369(b)(1) requires that challenges to the "issuance or denial" of a permit be brought within 120 days of such issuance or denial, unless a particular challenge "is based solely on grounds arising after such 120th day."

Rapanos v. *United States*, 547 U.S. 715 (2006) (arising from two separate enforcement cases). Indeed, in none of these cases did the Government even raise Section 1369(b)(1) as a potential barrier to review. This makes sense, given that Section 1369(b) contains no reference to either the Corps or the Section 404 permit program.

If Section 1369(b)(1)(F) is deemed to apply to the Clean Water Rule, however, the Corps will have flipped these jurisdictional dynamics on their head merely by undertaking a joint rulemaking process with EPA. Under the literal terms of Section 1369(b)(1), this case would be the only opportunity that challengers would have to contest the Rule, at least in the absence of new grounds.[11] It seems unlikely, to say the least, that Congress would have intended for the judicial-review dynamics of Corps regulations under the CWA to pivot so radically on the fortuity of whether the Corps happens to regulate in tandem

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[11] See fn. 13, *supra*; see also *Tex. Mun. Power Agency* v. *EPA*, 799 F.2d 173, 175 (5th Cir. 1986) (quoting *Natural Res. Def. Council, Inc.* v. *EPA*, 673 F.2d 400, 406 (D.C. Cir. 1982), *cert. denied sub nom Chem. Mfrs. Ass'n* v. *EPA*, 459 U.S. 879 (1982), for the proposition that those who fail to timely challenge qualifying actions under Section 1369(b)(1) "lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.").

with EPA.[15] The better interpretation is that Section 1369(b)(1)(F) applies only where EPA is taking action in response to specific permit applications.[16]

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[15] Indeed, this Court has assumed the opposite to be the case in *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009). In that case, EPA and the Corps had issued a joint regulation defining the phrase "fill material," a jurisdictional phrase used in Section 1344. 67 Fed. Reg. 31,129 (2002); 557 U.S. at 275 (citing 40 C.F.R. 232.2). In its brief, the respondent noted that under a literal reading of that rule, the term fill material might encompass materials particularly unsuitable for regulation under Section 1344, such as "feces and uneaten feed." 557 U.S. at 275. In response, this Court noted that such "extreme instances" were not before it. *Id.* Tellingly, it indicated that if such a situation were to arise, the respondents could bring a challenge arguing that "the fill regulation as interpreted is an unreasonable interpretation of [Section 1344]." *Id.* at 276.

[16] Even more bizarrely, if Section 1369(b)(1)(F) applies to EPA rules defining "waters of the United States," the Government could theoretically argue that cases such as *SWANCC* and *Rapanos* have no bearing on its pre-Clean Water Rule regulations defining that phrase, because the statutory time for reviewing EPA's rules—which were (and are) substantively identical to those of the Corps—would have long since passed. Compare, *e.g.*, 40 C.F.R. 122.2 (2012) (EPA), and 33 C.F.R. 328.3(a) (2012) (Corps).

B. Neither *E.I. du Pont* Nor *Crown Simpson* Establishes that Section 1369(b)(1)(F) Extends to EPA Rules Bearing Generally on the NPDES Program

Courts that have broadly construed Section 1369(b)(1) have relied on this Court's decisions in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*E.I. du Pont*"), and/or *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) ("*Crown Simpson*"). See, *e.g.*, *Natural Res. Def. Council* v. *EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981) (relying on both in determining that it had original jurisdiction to review certain regulations under Section 1369(b)(1)(E); *Nat'l Cotton Council of America* v. *EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (relying in part on *E.I. du Pont* in deeming that Section 1369(b)(1)(F) provided it with original jurisdiction to consider a regulatory exemption); see also *In re U.S. Dept. of Defense*, 817 F.3d at 270-273 (McKeague, J., lead opinion) (relying on both). But *E.I. du Pont* and *Crown Simpson* reflect narrow holdings appropriately tailored to a narrow statutory provision.

In *E.I. du Pont*, this Court considered whether Section 1369(b)(1) provides the courts of appeals with jurisdiction over challenges to "industry-wide regulations imposing . . . precise [effluent] limitations" on existing dischargers. 430 U.S. at 115. This Court's determination that EPA has the authority to promulgate effluent limitation regulations under Section 301

"necessarily resolve[d]" the jurisdictional question, because the courts of appeals plainly have jurisdiction over such regulations under Section 1369(b)(1)(E). *Id.* at 136. Once this Court found EPA had authority under the Act to promulgate effluent limitations as nationally applicable regulations and not just individual permit conditions, it looked to the plain meaning of Section 1369(b) and easily answered the jurisdictional question. *Id.*

In rejecting the argument that the courts of appeals lack original jurisdiction, this Court did express concern that such an interpretation would result in a "truly perverse situation in which the court of appeals would review the numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136. The "basic regulations" to which this Court was referring were, of course, the *effluent limitations* at issue in the case, which are explicitly reviewable in the courts of appeals pursuant to Section 1369(b)(1)(E). Regulations clarifying the waters to which the Clean Water Act applies are plainly not effluent limitations. And this Court's decision in *E.I. du Pont* should not be expanded beyond its narrow context to support the notion that the language of Section 1369(b)(1)(F) should be contorted to make unspecified actions reviewable in the courts of appeals.

Indeed, in *E.I. du Pont* this Court even recognized the probability that certain EPA actions very much resembling the promulgation of effluent limitations would not themselves be subject to review in the courts of appeals under Section 1369(b)(1): "If industry is correct that the regulations can only be considered [Section 1314] guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere." 430 U.S. at 125. This is because Section 1314 is not listed in Section 1369(b)(1). The promulgation of binding effluent limitations under Section 1311 and the adoption of Section 1314 effluent limitation guidelines are closely related actions.[17] The link between effluent

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[17] The CWA defines "effluent limitation" as "any restriction . . . on quantities, rates, and concentrations of" pollutants. 33 U.S.C. 1362(11). In contrast, EPA's establishment of "effluent limitation guidelines" constitutes a preliminary step that assists EPA in determining effluent limitations by, for example, "identify[ing] . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available" and "specify[ing] factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . ." 33 U.S.C. 1314(b)(1)(A)–(B). Thus, EPA's action in "approving or promulgating any effluent limitation" is informed by, but not the same as, EPA's action promulgating regulations providing guidance to the EPA on the setting of effluent limitations. *See, e.g.*, *Waterkeeper Alliance, Inc.* v. *EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (noting that "[t]he specific effluent limitations" at issue in the case "are dictated by the terms of more general 'effluent limitation guidelines' ('ELGs'), which are separately promulgated by the EPA.").

limitations and effluent guidelines is far closer than any connection between the Clean Water Rule and the issuance or denial of a permit under Section 1369(b)(1)(F). But, the point is that this Court resisted the notion that even very closely related actions should be swept into Section 1369(b)(1)'s coverage.

This Court's decision in *Crown Simpson* is similarly inapplicable here. In *Crown Simpson*, this Court found that the courts of appeals had original jurisdiction under Section 1369(b)(1)(F) over EPA's objection to a state-issued NPDES permit because EPA's objection was "functionally similar" to EPA's denial of an NPDES permit. 445 U.S. at 196. As the Ninth Circuit has recognized, *Crown Simpson* adopted a narrow understanding of "functional similarity," only finding that EPA's objection to a state-issued NPDES permit—which at the time[18] had the

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[18] Prior to the Clean Water Act Amendments of 1977, EPA was authorized to object to the issuance of state-issued NPDES permits, "but had no authority to issue a federal permit if the state refused to meet the EPA's objections." *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 871 (7th Cir. 1989). Under this regime, "an EPA objection effectively denied a permit because the objection created an impasse if the state refused to modify its proposed permit." *Id.* at 874 (citing *Crown Simpson*, 445 U.S. at 196). But the CWA now allows EPA to issue the permit itself, 33 U.S.C. 1342(d), a change of circumstance this Court expressly declined to consider in *Crown Simpson* given the timing of the Amendments relative to the permit veto at issue in that case. 445 U.S. at 194, n.2. The fact that Congress addressed

"precise effect" of denying the permit—was "functionally similar" to EPA's denial of a permit. *NWEA*, 537 F.3d at 1016 (citing *Crown Simpson*, 445 U.S. at 196).[19] Given this high degree of similarity, the *Crown Simpson* Court was willing to interpret Section 1369(b)(1)(F) in light of what it perceived to be "the congressional goal of ensuring prompt resolution of challenges to EPA's actions." 445 U.S. at 196.

As the denial of a permit is specifically listed within Section 1369(b)(1), it is wholly unremarkable that the Court would authorize the courts of appeals to review an action that had that "precise effect." As discussed above, in the Clean Water Rule context the Agencies' action of simply clarifying the waters to which the CWA applies does not have the "precise effect," or even close to the same effect, as the issuance or denial of an NPDES permit. Thus, *Crown Simpson* is

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the very quandary this Court was faced with makes *Crown Simpson*'s relevance to this case even more strained. *See Am. Paper*, 890 F.2d at 874 (holding that the 1977 Amendments "fundamentally altered the underpinnings of the *Crown Simpson* decision.").

[19] See also *Nat'l Mining Ass'n* v. *Jackson*, 880 F.Supp.2d 119, 134 (D.D.C. 2012), *rev'd on other grounds sub nom Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014) (finding that an EPA guidance document regarding the issuance of NPDES and Section 404 permits to surface mines was not "functionally similar" to the issuance or denial of an NPDES permit, because even though it "'relates to' the issuance of 402 permits . . . it [did] not amount to an EPA issuance or denial of a 402 permit" (citations omitted)).

not determinative of the instant case.

This Court in both *E.I. du Pont* and *Crown Simpson* found that the courts of appeals could hear direct challenges only to EPA actions listed in Section 1369(b)(1) or actions that had the "precise effect" of listed actions. Neither case supports the conclusion that this Court should read Section 1369(b)(1) to include EPA actions that Congress clearly excluded from the scope of the provision. [20]

C. The Courts that Have Broadly Applied Section 1369(b)(1)(F) to General NPDES Regulations Have Improperly Departed from the Statute

Despite the unambiguous language of Section 1369(b)(1)(F), a handful of courts of appeals decisions have construed Section 1369(b)(1)(F) as providing them with direct review over not only EPA's issuance or denial of NPDES permits, but over broader categories of NPDES program regulations. See, *e.g.*, *Am. Mining Cong.* v. *EPA*,

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[20] Other opinions from this Court counsel against an expansive reading of similar judicial review provisions. See, *e.g.*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (expressing concern that a broad reading of the CAA's judicial review provision would raise "constitutional difficulties" because "a failure to seek immediate review will bar affected parties from challenging the [EPA] action in a subsequent criminal prosecution.").

965 F.2d 759, 763 (9th Cir. 1992) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review "regulations governing the issuance of permits under [S]ection 402."); *Natural Res. Def. Council, Inc.* v. *EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review "rules that regulate the underlying permit procedures."); *Natural Res. Def. Council, Inc.* v. *EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review EPA rule exempting certain discharges from the NPDES permit requirements.); *Nat'l Cotton Council*, 553 F.3d at 932–933 (court of appeals had original jurisdiction under 1369(b)(1)(F) to review EPA rule exempting certain pesticides from the NPDES permit requirements).

Not one of these decisions, however, includes more than a few sentences of analysis of the courts' original jurisdiction under Section 1369(b)(1). Moreover, these courts have stretched this Court's decision in *E.I. du Pont* well beyond the narrow issue before the Court in that case. For example, the court in *American Mining Congress* cited as its main authority an earlier D.C. Circuit opinion involving Section 1369(b)(1)(E), which in turn relied on this Court's admonition in *E.I. du Pont* against creating a "perverse situation" of bifurcated review. 965 F.2d at 763 (citing *Natural Res. Def. Council, Inc.* v. *EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981), in turn citing *E.I. du Pont*, 430 U.S. at 136). In so doing,

the Ninth Circuit took this admonition out of its original context of Section 1369(b)(1)(E), involving effluent limitations, instead applying it to a different statutory subsection—Section 1369(b)(1)(F)—and to regulations governing NPDES permitting decisions. 965 F.2d at 763.[21] As discussed above, this Court's reference to the "basic regulations" meant the national effluent limitations at issue in that case, not NPDES regulations generally. *E.I. du Pont*, 430 U.S. at 136. The *American Mining Congress* court's misapplication of *E.I. du Pont* forged the above-mentioned chain of case law that has become untethered to the statutory basis of this Court's ruling.[22] *American Mining Congress* and

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[21] The Ninth Circuit mistakenly read the D.C. Circuit's opinion as having made this same leap. 956 F.2d at 763. In fact, the court in *Natural Res. Def. Council, Inc.* v. *EPA* found that it had original jurisdiction under Section 1369(b)(1)(E), not Section 1369(b)(1)(F). 656 F.2d at 776.

[22] Other courts began suggesting a broader interpretation of Section 1369(b)(1) even before this line of cases, though the reach of their analyses was not always clear. For example, in *Natural Res. Def. Council, Inc.* v. *EPA*, the D.C. Circuit held that Section 1369(b)(1)(E) applied to NPDES regulations that included some provisions "guid[ing] the setting of numerical limitations in permits." 673 F.2d 400, 404-405 (D.C. Cir. 1982). To the extent the court believed it had jurisdiction over every regulation included in the 1980 Consolidated Permit Regulations ("CPRs"), it was mistaken. That the courts of appeals might have jurisdiction over challenges to "some of the CPRs", *id.* at 404, does not support the conclusion that the courts of appeals have jurisdiction over challenges to all of the CPRs. The D.C.

subsequent courts erred in assuming that *E.I. du Pont* provides them with original jurisdiction over regulations governing NPDES permitting procedures.

III. AN EXPANSIVE READING OF SECTION 1369(b)(1) DISRUPTS THE TRADITIONAL JURISIDCTION FEDERAL COURTS MAINTAIN TO REVIEW AGENCY ACTIONS

In cases like *Riverside Bayview*, *SWANCC*, and *Rapanos*, this Court long has assumed it has the authority to consider on an as-applied basis the legality of rules establishing the limits of statutory jurisdiction under the Clean Water Act.[23] Taken together, these decisions–and the readiness with which all concerned assumed that review was appropriate–highlight an important point: Requiring those who may be affected by specified EPA rules to seek immediate, facial review regarding the validity of those actions is an *exception* to the otherwise applicable assumption that agency rules may be evaluated on an as-applied basis.[24] The Administrative

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Circuit also offered no support for its distinction between policy-based rules and substantive rules. *Id.* at 405 & n.15.

[23] See also the discussion in fn. 15, *supra*, regarding *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

[24] As mentioned in fn. 13, *supra*, Section 1369(b)(1) requires that all challenges to qualifying actions be brought within 120 days, unless the relevant application "is based solely on

Procedure Act ("APA") acknowledges this broad scope of review in Section 701(a), where judicial review is granted "except to the extent that–(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

In evaluating statutory preclusion principles, this Court has routinely applied a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[s]." *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (permitting review of an agency action under the Immigration and Nationality Act).[25] In order to rebut this presumption, there must be "clear and convincing evidence" to the contrary. *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (citing *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967)). A narrow interpretation of Section 1369(b)(1) is consonant with the general presumption of reviewability under the APA and this Court's

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grounds which arose after such 120th day." 33 U.S.C. 1369(b)(1)(F).

[25] See also *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 675–78 (1986) (interpreting the Medicare statute to allow an individual to challenge a regulation's validity despite a preclusion on review for individual claims under the statute); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995) (explaining that when a statute is "reasonably susceptible to divergent interpretation," this Court adopts the reading "that executive determinations generally are subject to judicial review").

previous review of CWA regulations outside the context of Section 1369(b)(1).

The Government is likely to cite *Crown Simpson* in arguing that its expansive interpretation of Section 1369(b)(1)(F) would ensure prompt resolution of the relevant statutory issues. 445 U.S. at 197. As noted, however, this reading of Section 1369(b)(1)(F) stretches both the statute and *Crown Simpson* beyond their breaking points. Moreover, the very virtue that the Government sees in its countertextual reading of Section 1369(b)(1)(F)—as its limitation on challenges to those brought within 120 days—poses countervailing policy dynamics that pull at least as hard in the opposite direction.

If Section 1369(b)(1)(F) is extended beyond the realm of permit decisions to rules addressing statutory jurisdiction, the net result will be unnecessary and excessive litigation. This is because, like much of environmental law, jurisdictional issues under the CWA are inevitably laden with what this Court—in a slightly different context—has termed "everpresent ambiguities." *Interstate Commerce Comm'n* v. *Brotherhood of Local Eng'rs*, 482 U.S. 270, 286 (1987). In such situations, even those who track regulatory developments closely may face significant uncertainty about whether the regulations apply to specified scenarios: the regulations may mean what they believe they should mean, or they may not. See, *e.g.*, *Decker* v.

Northwest Env. Def. Ctr., 133 S.Ct. 1326, 1336-1338 (2013) (involving the issue whether runoff from timber roads constituted "storm water discharges from . . . immediate access roads . . . used or traveled by carriers of raw materials," within the meaning of 40 C.F.R. 122.26(b)(14)); *Recreational Vehicle Indus. Ass'n* v. *EPA*, 653 F.2d 562 (D.C. Cir. 1981) (involving the issue of whether motor homes qualified as "medium and heavy trucks" within the meaning of the relevant regulation); *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 220-223 (4th Cir. 1997) (addressing whether the term "use" in an exemption to EPA's fugitive emission regulations meant overall consumption or, alternatively, whether the relevant chemical was counted each time it cycled through the system); *United States* v. *Magnesium Corp. of America*, 616 F.3d 1129 (2010) (finding that EPA was not precluded from relying on a new interpretation of an ambiguous regulatory exemption merely because it previously had announced a different, tentative, interpretation).

In the Clean Water Act context, this uncertainty can plague both potential environmental petitioners and both regulated and potentially regulated entities. For would-be environmental challengers, the regulations may not clearly indicate whether they address scenarios the environmental challengers believe must be regulated under the statute. In other contexts, regulated entities may be unsure about whether or how the new regulations apply to

them.

In all of these situations, the relevant entities may face what would traditionally appear to be unripe claims. See *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 728 (1998) (deeming a speculative application of a general forestry plan not to be ripe for review). But at the same time, they may risk waiving valid statutory arguments if they do not bring their challenges within 120 days, the prescribed period under Section 1369(b)(1). *See Brotherhood of Local Eng'rs*, 482 U.S. at 286 ("[w]e are not prepared to acknowledge an exception . . . where an order is ambiguous, so that a party *might* think that its interests are not infringed") (emphasis in original). Instead, their ability to challenge any later applications of those regulations may be limited to arguments about whether the agency's resolutions of any ambiguities are clearly erroneous, see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), rather than whether the regulations—as so interpreted—are consistent with the CWA.

The courts have suggested two potential solutions to this problem, neither of which is entirely satisfying. In *Brotherhood of Local Eng'rs*, this Court suggested that such entities should file petitions with the agencies to resolve any ambiguities within the relevant statutory time periods, which would "enable[e] judicial review" if the agency's "resolution of the ambiguity is adverse." 482 U.S. at 286. This, of course, presumes that the agency would respond

within the relevant statutory period—120 days under Section 1369(b)(1)—which may be an uncertain prospect.

Second, despite *Brotherhood of Local Eng'rs*, the D.C. Circuit has continued to apply an implied ripeness exception to these strict statutory time limits in situations in which the ambiguity is such that a later petitioner "could reasonably have understood [the regulation] to mean *only* what [it] thought it meant." *ANR Pipeline Co.* v. *FERC*, 988 F.2d 1229, 1233-1234 (D.C. Cir. 1993) (emphasis in original). This exception is narrow, and the D.C. Circuit has long admonished would-be petitioners that "if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985) (emphasis in original).

Requiring parties to file petitions and/or seek immediate judicial review in the face of any and all regulatory ambiguities would, to say the least, be highly inefficient. But given the "speak now or forever hold your peace" dynamics embodied in these judicial review provisions, interpreting them broadly poses this very risk. As Judge Easterbrook noted:

> [T]he more we pull within [Section 1369(b)(1)], the more arguments will be knocked out by inadvertence later on—and the more reason firms will have to petition for review of everything in sight.

Am. Paper Inst. v. *EPA*, 882 F.2d 287, 289 (7th Cir. 1989).

Additionally, as Justice Powell observed more than 35 years ago, there are potential due process issues–and at the very least serious fairness concerns–inherent in the preclusion dynamics posed under provisions like Section 1369(b)(1). In his concurring opinions in both *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 289-291 (1978), and *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 594-595 (1980), Justice Powell stressed these concerns in cases involving 42 U.S.C. 7607(b)(1), the Clean Air Act's structurally-similar judicial review provision.

In *Adamo*, Justice Powell expressed doubt about the constitutionality of Section 7607(b)(1), which at the time required that challenges be brought within 30 days after EPA promulgated the relevant regulations. 434 U.S. at 289. In so doing, he noted his view that:

> It . . . is totally unrealistic to assume that more than a fraction of the persons and entities affected by the regulation–especially small contractors scattered across the county–would have knowledge of its promulgation or familiarity with or access to the Federal Register.

Id. at 290. Noting that this Court previously had upheld a similar scheme against a due process challenge in *Yakus* v. *United States*, 321 U.S. 414 (1944), Justice Powell opined that this earlier

opinion was "at least arguably distinguishable" because it involved the Emergency Price Control Act, which this Court had noted was an emergency, war-time measure. 434 U.S. at 290.

By the time *Harrison* came before the Court two years later, Congress had amended Section 7607(b)(1) to extend the period within which regulations could be challenged to 60 days. 446 U.S. at 594. While concurring with the majority's view that Section 7607(b)(1) applied to EPA's action in that case, Justice Powell reiterated his concern that publication of a rule in the Federal Register "is unlikely to provide constitutionally adequate notice that a failure to seek immediate review immediate will bar affected parties from challenging the noticed action in a subsequent criminal prosecution." *Id.* He further indicated his agreement with the D.C. Circuit that, at the very least, "these constitutional dynamics may counsel a narrow construction of [42 U.S.C. 7607(b)(1)]." *Id.* (citing *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 912-914 (D.C. Cir. 1979)).[26]

At a minimum, an expansive interpretation of Section 1319(b)(1) would pose a host of ripeness, judicial inefficiency, and fairness concerns. Additionally, the due process concerns Justice

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[26] While would-be environmental petitioners may not have a due process right to challenge suspect regulations, the concerns that Justice Powell has identified are still salient from notice and fairness perspectives.

Powell identified in *Adamo* and *Harrison* are elevated where the rules sweep as broadly as do the jurisdiction-defining rules here. In sum, these policy concerns far outweigh the Government's interest in expedition and clarity. The Court should avoid these negative policy implications by interpreting Section 1369(b)(1)(F) as written.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss these consolidated petitions for lack of jurisdiction.

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Respectfully submitted,

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